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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

SHELL OIL COMPANY
AND
HARBOR TOWING CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a Government claim alleging a negligent violation of the Federal Water Pollution Control Act, 33 U.S.C. §1321, (i.e., an oil spill) and seeking damages for injuries resulting therefrom (i.e., clean-up costs) accrues, under the tort limitations provisions of 28 U.S.C. §2415(b), when the spill occurs or not until the clean-up has been completed?

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Shell Oil Company ("Shell") and Harbor Towing Corporation ("Harbor Towing") respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals entered in this proceeding on December 10, 1980.

OPINION BELOW

The opinion of the Court of Appeals, reported at 635 F.2d 1108 (4th Cir. 1980), appears in the Appendix hereto, p. A1.

JURISDICTION

The order of the Court of Appeals for the Fourth Circuit was entered (time of day not recorded) on December 10, 1980. Petitions for rehearing and suggestions for rehearing *en banc* filed by Shell and Harbor Towing were denied on March 6, 1981. Appendix, p. 15a. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved on this case are 28 U.S.C. Section 2415 (Statute of Limitations) and 33 U.S.C. Sections 1321 *et seq.* (the Federal Water Pollution Control Act of 1972). The texts of the statutes are set forth in the Appendix hereto, p. 16a.

STATEMENT OF THE CASE

The case is an action, brought in the United States District Court for the District of Maryland, by the United States under 33 U.S.C. §1321 (the Federal Water Pollution Control Act of 1972 - "the FWPCA") for damages (the costs incurred in cleaning up an oil spill) sustained as the

result of an alleged violation of the Act (a prohibited discharge of oil). Jurisdiction rested on 28 U.S.C. 1331. The spill occurred on August 10, 1975. More than three years later, on September 6, 1978, the case was instituted.

Named as defendants were the Petitioners herein, Harbor Towing (the owner of the barge from which the oil spilled) and Shell (the supplier of oil to the barge).[1].

The Complaint alleged that in August of 1975 about 3,224 barrels of oil overflowed from the barge SHAMROCK while it was being loaded at Wagner's Point in Baltimore, Maryland at a petroleum terminal owned and operated by Shell. The Government, it is alleged, cleaned up the spill "at a cost to it of $462,098.62."

Both Shell and Harbor Towing, in the Complaint, were accused of tortious conduct. With respect to Shell, the Complaint alleged that it was:

> "*willfully negligent* with privity and knowledge . . . [in that] (d) Shell Oil knew that its dockman slept on duty and did not make proper rounds of inspection, but did nothing to insure the keeping of an alert watch [and] knowingly overworked its dockman."

The Complaint further alleged, as to Shell, that "Shell Oil's dockman was careless, incompetent, and inattentive to his duties," that he was "overworked and fatigued" and "slept on duty during loading."

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[1]Two other defendants — the barge SHAMROCK and Water Quality Insurance Syndicate — were named in the Complaint. Neither was ever served with process. The listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioners, as required by Rule 28.1, is set forth in the Appendix, p. 42a.

With respect to Harbor Towing and the SHAMROCK, the Complaint alleged that they were:

> "*willfully negligent* with privity and knowledge . . . [in that] (a) Harbor Towing knew that the SHAMROCK was undermanned, but did nothing to man her properly; (b) Harbor Towing knew that both its tankerman and Shell Oil's dockman slept during oil transfer, but did nothing to insure that its tankermen was alert on watch [and] knowingly overworked its tankermen."

The Complaint further alleged, as to Harbor Towing, that the SHAMROCK was unseaworthy and that Harbor Towing was otherwise negligent.

With respect to causation, the Complaint alleged that the discharge of oil was caused by the noted negligent or willful acts or omissions of the defendants and "was not caused or contributed to in any way by plaintiff United States."

During discovery, Shell and Harbor Towing served interrogatories upon the Government which inquired as to the date on which the Government contended its cause of action accrued. The Government's answer (which it never amended or sought to amend) to those interrogatories was: "August 10, 1975, by reason of the fact that oil from Shell's facility entered the Patapsco River on that date."

In due course, Petitioners moved for summary judgment on the ground that the Government's claim was barred by the applicable statute of limitations. 28 U.S.C. §2415(b). Section 2415(b) mandates that any action for money damages brought by the United States which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues.

On July 16, 1979 summary judgment was entered by the District Court in favor of Petitioners, on the basis that the Government's claim was barred by limitations. In granting

the judgment the late Judge Blair remarked:

> "It would not be a fair reading of the law to hold that where Congress spoke of 'negligence' and 'willful misconduct' it was not talking about tort. Accordingly, the statute of limitations which applies to tort actions brought by the United States, 28 U.S.C. §2415(b), bars the government from recovering its expenses incurred in cleaning up the defendants' spilled oil under 33 U.S.C. §1321 (f) . . . ."

On appeal, the Fourth Circuit (by a divided panel) reversed. In reversing, the majority agreed with the Government's contention (first raised on appeal) that the cause of action, even though "founded upon a tort" and therefore subject to the limitations provisions of Section 2415(b), did not accrue when the injury (i.e., the oil spill) occurred, but rather at a later date.

REASONS FOR GRANTING THE WRIT

THE COURT'S DECISION THAT THE GOVERNMENT'S CLAIM IN AN OIL SPILL CASE DID NOT ACCRUE WHEN THE SPILL OCCURRED CONFLICTS WITH THE ESTABLISHED BODY OF LAW THAT A CAUSE OF ACTION IN TORT ACCRUES AT THE TIME A WRONG IS COMMITTED. UNLESS CORRECTED NOW, IT WILL CAUSE GENERAL CONFUSION AND DISORDER AMONG THE COURTS AND WILL CAUSE EXTRAORDINARY INCONVENIENCE IN THIS PARTICULAR CASE. THE ISSUE IS A CLEAR-CUT AND IMPORTANT ONE THAT IS FUNDAMENTAL TO THE FURTHER CONDUCT OF THE CASE.

"We can have no equal justice when a citizen must bring his grievance into court against the Government within a specified period of time — if we do not impose similar time limits on the Government's claims against its citizens." So spoke President Lyndon Johnson in July of 1966 upon signing the statute of limitations legislation now codified in 28 U.S.C. §2415. The effect of the ruling as to which review is sought here, however, is to create a time limit on the Government's tort claims against its citizens different, and longer, than that allowed in actions by private parties. The ruling is contrary to the intent of the limitations statute and contrary to the established body of law in this country that a cause of action in tort accrues at the time a wrong is committed. Unless corrected now, this erroneous holding will create disorder among the courts and other litigants and undue hardship in this case.

The opinion is a bizarre one. It may be because the majority of the panel made a crucial finding of fact as to the accrual date - "a matter contested by the parties and not even considered by the district court."[2] 635 F.2d at 1113-14 (dissenting opinion). It may be because the majority of the panel, having concluded that it would be "*unjust*" to apply limitations in this instance[3], clutched upon an ersatz theory thrown up by the Government *for the first time on appeal.*

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[2]The district court did not consider the issue because it was not raised by the Government. Instead, the Government, on the record before the trial court, conceded under oath that its cause of action had accrued on August 10, 1975, when the oil entered navigable waters. 635 F.2d at 1113-14.

[3]The result-oriented approach of the majority is typified by the penultimate sentence of their opinion: "It would be unjust to impose the costs on the government which was in no way involved in the spill while permitting the perpetrators of the damage to escape liability." 635 F.2d at 1111-12.

What the majority of the panel did was to adopt (and rest its opinion solely on) the Government's assertion that "even if the three year time bar for torts [of 28 U.S.C. §2415(b)] is applicable [to actions brought under the FWPCA], the complaint was timely filed on September 6, 1978." 635 F.2d at 1110. By adopting the three year tort action limitation period for the claim, the majority was compelled to locate an accrual date later than the date of the spill in order to achieve its desired result. It did so by disguising the case as an "action for recouping expenses incurred by the government" instead of forthrightly acknowledging it to be a pure tort action.[4] Having muddled the nature of the cause, the majority then held that (as such) it did "not fully accrue[5] until the government [had] completely exercised its 'option' and completed the clean-up operation." 635 F.2d at 1110.

This "disguising" of the action as one for recoupment cannot be supported. The Government did not perform any

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[4]It did not hold that the action was founded upon a contract or quasi-contract, a point for which the Government argued a six year limitation period was applicable. That the cause of action is founded in tort, with the damages being the clean-up costs, is emphasized in *United States v. City of Redwood City,* 640 F.2d 963, 969-70 (9th Cir. 1981) ("Oil pollution in navigable waters has been deemed a tort for which the United States is entitled damages.").

[5]The focus on when the action "fully" accrued is itself error since the statute speaks in terms of when a cause of action "first accrues" - not when it fully accrues. 28 U.S.C. §2415(b). This theory and the unsupported "option" concept were taken from the Government's brief.

action which any statute made Petitioners responsible for performing.[6]

The majority's holding that the cause of action did not accrue until September 12, 1975, the date suggested by the Government on appeal as the last day of the clean-up operation, was clearly wrong. This conclusion, conflicting with the established body of law in this country that a cause of action in tort accrues at the time a wrong is committed, as noted above, will cause havoc with the courts, and create undue hardship in this particular case, unless corrected now.[7]

The cause of action against the Petitioners was for the actual amount of the removal costs based upon their alleged "willful negligence". Hence, there was no necessity to wait for a determination of the total costs since all costs were recoverable. Willful negligence was alleged in an effort to circumvent the limitation of liability provisions of the FWPCA, which, in the case of Harbor Towing at least, limited the SHAMROCK's liability to $57,500.00.

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[6]Unlike the "wreck statute", 33 U.S.C. §407, the FWPCA does not create a duty on the part of a spiller to clean up spilled oil. That duty is placed on the President, who can permit the spiller to do the clean-up *if* the spiller wishes to and *if* the President determines that the clean-up "will be done properly" by the spiller. Judge Blair relied upon the legislative history of the FWPCA and observed that ". . . the primary duty to take steps to abate pollution rests with the President not with the polluter." H.R. Conf., Rep. No. 91-940, 91st Cong., 2nd Sess. 39, reprinted in [1970] U.S. Code, Cong. and Ad. News 2712, 2723. ("The Conferees wish to make it clear that the basic responsibility for necessary cleaning up in these situations is placed upon the President.")

[7]Mr. Justice Renquist, of course, has noted recently the importance of the FWPCA, suggesting review of an interpretation of the Act even absent a conflict. *Hollywood Marine, Inc. v. United States,* No. 80-1169, *cert. denied,* May 18, 1981 (49 U.S.L.W. 3858).

The universally recognized rule of law is that when an injury coincides with a negligent act, and some damage is discernible at that time, the cause of action accrues and the statute of limitations starts running. *United States v. Kubrick*, 444 U.S. 111 (1979); *Portis v. United States*, 483 F.2d 670 (4th Cir. 1973); *Ford Motor Credit Co. v. Minges*, 473 F.2d 918 (4th Cir. 1973); *Steele v. United States*, 599 F.2d 823 (7th Cir. 1979); *Lynch v. United States Army Corps of Engineers*, 474 F. Supp. 545 (D. Md. 1978), *aff'd w/o opinion* 601 F.2d 581 (4th Cir. 1979); *Harig v. Johns-Mansville Products Corp.*, 284 Md. 70, 394 A.2d 299 (1978).

Where an injury is sustained in consequence of the wrongful act of another, limitations attach at once. The fact that the full extent of the damages cannot be determined at the time of the wrongful act does not postpone the running of the statute of limitations. *Portis v. United States, supra; Nardone v. Reynolds*, 508 F.2d 660 (5th Cir. 1975); *Lynch v. United States Army Corps of Engineers, supra; Davies v. Krasna*, 14 Cal.3d 502, 535 P.2d 1161 (1975). The Government's "option" concept, of course, was simply an effort to avoid the bar created by this legal rule.

The Restatement concludes that a statute of limitation does not begin to run until the tort is complete, i.e., when there has been "an invasion of a legally protected interest of the plaintiff." In a negligence action, where damage is the last essential element of the tort, the "cause of action for negligently harming a person or thing is complete when the harm occurs." *Restatement (Second) of Torts*, §*899*, Comment c. at 441 (1979). *Accord, Developments in the Law - Statutes of Limitations*, 63 Harvard L. Rev. 1177, 1201 (1950) ("If harm is deemed the gist of the action, the occurrence of harm marks the beginning of the period"). The

harm on which the Government's present action is founded, the entry of the oil into navigable waters of the United States, occurred on August 10, 1975, and it was on that date on which the Government's cause of action accrued.

A plaintiff's injury provides adequate notice to him of the possibility that his legal rights have been invaded. The Government in this case was aware of the spill on August 10, 1975 and the statute of limitations began to run from that date. *R. J. Reynolds Tobacco Co. v. Hudson,* 314 F.2d 776, 781-82 (5th Cir. 1963). All the facts which were needed to prove this tort occurred on August 10, 1975.

The conclusion of the majority of the Fourth Circuit panel that this cause of action did not accrue at the time when harm occurred, but rather at a later arbitrarily selected and unproven date, flatly conflicts with established state and federal law.[8]

[8] *See Tessier v. United States,* 269 F.2d 305 (1st Cir. 1959) (There was a legal wrong as soon as the metal fragments were abandoned in him "and suit thereon was not suspended because of any duty imposed on the United States to remove the fragments.") *id.* at 309; *Triangle Underwriters, Inc. v. Honeywell, Inc.,* 604 F.2d 737 (2d Cir. 1979) ("Cause of action accrues when acts or omissions constituting negligence produce injury") *id.* at 744; *Ciccarone v. United States,* 486 F.2d 253 (3d Cir. 1973) ("The two year statute of limitations begins to run when a trauma coincides with the negligent act and some damage is discernible at the time. . .") *id.* at 256; *Beech v. United States,* 345 F.2d 872 (5th Cir. 1965) ("where the trauma coincides with the negligent act and some damage is discernible at the time.") *id.* at 874; *Kington v. United States,* 396 F.2d 9 (6th Cir.) (accrued at the time death occurred and not when the precise cause of death was learned) *cert. denied,* 393 U.S. 960 (1968); *Steele v. United States,* 599 F.2d 823 (7th Cir. 1979) ("[If] some damage is discernible at that time, the cause of action accrues and the statute of limitations begins to run immediately") *id.* at 828; *Hulver v. United States,* 562 F.2d 1132 (8th Cir. 1977) ("[O]ne who knows he

(continued)

Petitioners are well aware of "the Court's normal practice of denying interlocutory review." *Estelle v. Gamble,* 429 U.S. 97, 114 (1976) (Stevens, J., dissenting). But, exceptions are made where there is some important and clear-cut issue of law that is fundamental to the further conduct of the case. *Estelle, supra*; *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). Such an issue exists here.

(footnote continued from proceeding page)

has suffered from medical malpractice may not postpone an action until the full extent of his damage is ascertained.") *id.* at 1137, *cert. denied,* 435 U.S. 951 (1978); *Ashley v. United States,* 413 F.2d 490 (9th Cir. 1969) (accrued at time injury occurred not at the time plaintiff learned the full extent of the damages); *Robbins v. United States,* 624 F.2d 971 (10th Cir. 1980) ("[A] legally cognizable injury or damage begins the running of the statutory period of §2401 (b) even though the ultimate damage is unknown or unpredictable.") *id.* at 973.

CONCLUSION

For the reasons stated above, the Court is asked to grant certiorari in the instant case.

Respectfully submitted,

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APPENDIX

UNITED STATES v. BARGE SHAMROCK
Cite as 635 F.2d 1108 (1980)

UNITED STATES of America,
Appellant,
v.
The BARGE SHAMROCK, her tackle apurtenances, etc., and Harbor Towing Corporation, Shell Oil Company and Water Quality Insurance Syndicate, Appellees.

No. 79-1603.

United States Court of Appeals,
Fourth Circuit.

Argued May 6, 1980.

Decided Dec. 10, 1980.

Alfred Mollin, Washington, D. C. (Alice Daniel, Asst. Atty. Gen., Washington, D. C., Russell T. Baker, Jr., U.S. Atty., Baltimore, Md., Leonard Schaitman, Dept. of Justice, Civ. Div., Appellate Section, Washington, D. C., on brief), for appellant.

John Henry Lewin, Jr., Baltimore, Md. (James K. Archibald, Venable, Baetjer & Howard, John T. Ward, M. Hamilton Whitman, Jr., Ober, Grimes & Shriver, Baltimore, Md., on brief), for appellees.

Before WINTER, WIDENER and SPROUSE, Circuit Judges.

SPROUSE, Circuit Judge:

On September 6, 1978, the United States filed this action to recover $462,098.00 in costs expended by the Government in removing an oil spill. The district court, holding the action barred by a statute of limitations, granted summary judgment for the defendants and the Government appeals.

The Barge Shamrock discharged the oil while being loaded at Wagners Point, Baltimore Harbor, Maryland, on August 10, 1975. The defendants are Shell Oil Company (which was loading the barge) and Harbor Towing Corporation (which owned the barge) (collectively, Companies). Three years elapsed between the spill of August 10, 1975, and filing of the action on September 6, 1978. We hold that the computation of time for filing the action commenced on September 12, 1975, when the government completed the oil removal. Since less than three years elapsed from that event until the action was filed, the case must be reversed and remanded for trial.

The *Shamrock* lay moored at Shell's Wagners Point petroleum terminal at about 1:00 a. m. on August 10, 1975, and began loading from Shell's shoreline at that time. Approximately 135,000 gallons of oil soon overflowed from the *Shamrock's* tanks into the Patapsco River. Neither Harbor Towing nor Shell attempted to remove the oil. The complaint alleged that the *Shamrock* was unseaworthy and undermanned, that her crew was careless, incompetent, overworked, fatigued, and asleep on duty during the loading, that Shell Oil's dockman was careless, incompetent, overwored, fatigued, and asleep on duty during the loading, and that both companies were willfully negligent in that they knew of these conditions concerning their respective personnel yet did nothing to remedy the conditions.

The Government, in answering interrogatories, furnished the Coast Guard report covering the entire incident. Among the details disclosed was the oil removal completion date—September 12, 1975.

The action was brought under the Federal Water Pollution Control Act (the Act) Subsection, 33 U.S.C. 1321(b)(3), which prohibits discharges of oil or hazardous substances into certain navigable waters of the United States.

The Act contains a variety of penalty and cleanup cost-recovery provisions for oil spills. Administrative penalties up to $5,000 may be imposed, without a showing of fault. The administrator of the Act may also seek judicially-imposed penalties. The Government may recover the actual cost of cleanup operations for spills from vessels up to a maximum of $250,000, even without fault. It may recover all actual removal costs without maximum limitation on the showing of willful negligence or willful misconduct. 33 U.S.C. § § 1321(b)(6)(A), 1321(b)96)(B), 1321(f)(1).

There is no specific statute of limitations contained in the Act. The Companies contend that 28 U.S.C. §2415 controls this action. Section 2415 expresses generally the time limitations barring actions against the Government. The Companies argue that the oil spill was a tort, and is thus governed by the three-year time bar specified for torts in section 2145 [sic]. The district court agreed and held that since the oil spill occurred on August 10, 1975, more than three years prior to filing of suit on September 6, 1978, the action was time-barred.[1]

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[1]The opinion of the late Judge Blair is adopted as the principal part of the dissent. It should be noted, however, that the language of the district court quoted in the dissent was not considered in the majority opinion. The reasoning was not approved or disapproved because it was not necessary to the disposition of the case. As is discussed, *infra*, the conclusions of the majority are based on a later accrual date for the government's cause of action.

[1] The Government contends that Congress did not intend the Federal Water Pollution Control Act to be subject to the provisions of section 2145 [sic]. It argues, alternatively, that even if the three-year time bar for torts is applicable, the complaint was timely filed on September 6, 1978. Although the spill occurred on August 10, 1975, the Government argues that the cause of action did not accrue until September 12, 1975—when the oil removal was completed. We agree with this latter contention and reverse and remand for trial. We need not consider the other arguments advanced by the parties since, under any of those theories, the action would not be time-barred.

[2] The primary duty for cleaning the oil spill, was of course, upon the Companies. *Cf. Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967) (removal of sunken barges); *United States v. Perma Paving Co.,* 332 F.2d 754 (2nd Cir. 1964) (removal of man-made shoal). *See also Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 332-334, 93 S.Ct. 1590, 1595-1596, 36 L.Ed.2d 280 (1973).

Section 1321(c)(1) of the Act provides:

> Whenever any oil or a hazardous substance is discharged, . . . the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

33 U.S.C. § 1321(c)(1). The President is thus authorized to arrange for removal of the spill unless he determines that the removal will be done properly by the owner or operators of the facilities involved. In order to avoid the obvious consequences of possible delay or ineffectiveness Congress, with this section, provided the Executive Branch an option.

The option is sufficiently broad to effect the Congressional purpose of efficiently removing contaminants and fixing responsibility. The President may act or decline to act. Presumably, once a government cleanup is started it can be delayed at the direction of the President. He could direct a responsible party to become involved. Government action in appropriate circumstances might be terminated prior to completion.

The cause of action for recouping expenses incurred by the government does not fully accrue until the government has completely exercised its option and completed the cleanup operation. Supportive of this logic is 28 U.S.C. §2416, which provides:

> For the purpose of computing the limitations periods established in section 2415 [28 U.S.C.S. §2415], there shall be excluded all periods during which—
>
> . . . . .
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances. . . .

See also United States v. Boyd, 520 F.2d 642, 645 (6th Cir. 1975), *cert. denied,* 423 U.S. 1050, 96 S.Ct. 776, 46 L.Ed.2d 638 (1976).

[3,4] The Companies correctly contend that the September 12 removal completion date was not argued to the district court as the accrual date for the cause of action. They argue that this issue cannot be considered on appeal. It is true that this Court does not generally pass on issues not previously raised. *United States v. One 1971 Mercedes Benz,* 542 F.2d 912 (4th Cir. 1976); *United States v. Chesapeake & Ohio Ry. Co.,* 215 F.2d 213 (4th Cir. 1954). *See also Singleton v. Wulff,* 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). There are instances,

however, when issues not previously raised should be entertained on appeal. If the error is "plain" and a refusal to treat it would result in the denial of fundamental justice, it should be decided. In *Ricard v. Birch,* 529 F.2d 214 (4th Cir. 1975) we considered an issue which was raised for the first time on appeal.

> The defendant argues, however, that the statute should not be applied because it was not raised in the district court. Ordinarily, of course, we do not pass on questions that were not presented to or considered by the district court, but orderly rules of procedure do not require sacrifice of the rules of fundamental justice. "Indeed, if deemed necessary to reach the correct result, an appellate court may *sua sponte* consider points not presented to the district court and not even raised on appeal by any party."

Id. at 216, *quoting Washington Gas Light v. Virginia Electric & Power Co.,* 438 F.2d 248 (4th Cir. 1971). *See also Walker Manufacturing Co. v. Dickerson, Inc.,* 560 F.2d 1184, 1187 n. 2 (4th Cir. 1977). This Court has also held:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Washington Gas Light, supra at 250, *quoting Hormel v. Helvering,* 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941).

The facts concerning the removal of the oil spill are documented in the record by the Coast Guard investigative

report. The September 12 completion date is undisputed.[2] The issue of whether it was the critical date should have been obvious to the parties and to the trial court. The Government's failure to previously argue the September 12 date, therefore, does not inhibit us from considering it.[3] It would be unjust to impose the costs on the government which was in no way involved in the spill while permitting the perpetrators of the damage to escape liability.

The case is reversed and remanded for proceedings consistent with the views expressed in this opinion.

REVERSED AND REMANDED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

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[2]The record is brief because the case was decided on the defendants' motion for summary judgment. The Coast Guard investigative report was an integral part of the record. It was not only not contested, but was obviously an independent factual source. The defendants did not at trial nor on appeal contest the factual accuracy of the statement that the final clean-up was not completed until September 12. They only assert that the date of the spill rather than the date of clean-up completion initiates the statute of limitations.

[3]The dissent stresses the government's admissions during discovery proceedings that August 10 was the day on which the cause of action accrued because the spill occurred on that date. There is no question, of course, that the spill occurred on August 10, just as there is no question that the clean-up operation was not completed until September 12. The issue as to whether the cause of action accrued on the date of the spill or the date of the clean-up completion, however, is a question of law. The majority believes, for the reasons expressed in the body of the opinion, that under the correct interpretation of the applicable statutes the government's cause of action did not finally accrue until the clean-up operation was completed.

I

I would affirm on the opinion of Judge Blair which, because it was not published and Judge Blair having since died, I now copy below and adopt as my own.

"On August 10, 1975, while the barge SHAMROCK was taking an oil at Shell Oil Company's petroleum terminal in Baltimore, Maryland, over 3000 barrels of oil spilled into the Patapsco River. More than three years later, in September 1978, the United States brought this action against Shell Oil, the SHAMROCK and her owner, Harbor Towing Corporation, to recover the amount the government expended to clean up the oil. The defendants have moved for summary judgment under Fed.R.Civ.P. 56 on the grounds that the suit is barred by the applicable statute of limitations, 28 U.S.C. §2415(b).

"That section provides that every action for money damages brought by the United States 'which is founded upon a tort' is barred unless filed within three years after the right of action accrues. The defendants reason that an action to recover the costs of removing oil polllution is an action 'founded upon a tort.'

"The government responds that this action is founded not upon a tort but upon the sovereign's right under the Constitution to insure and protect the cleanness of its navigable waters, a right, it is argued, which is not subject to any statute of limitations. The complaint did not specify the theory of liability supporting this action. The government argues now that there are some six possible theories of recovery,[1] all intertwined, and all

[1]The government asserts the following sources of liability:

1. Under the Rivers and Harbors Act of 1899, for injunction, damages, and penalty.
2. Under the general maritime tort law.
3. Under the common law of nuisance, for an injunction or its monetary equivalent.
4. In equity, for an injunction or its monetary equivalent.
5. In equity, for restitution.
6. Under the Federal Water Pollution Control Act, 1972 (FWPCA), for an injunction, cleanup costs, and penalty.

'founded' upon the authority of the sovereign to abate pollution. This argument has been foreclosed, however, by the recent decision of the Fourth Circuit in *Steuart Transportation Company v. Allied Towing Corporation,* 596 F.2d 609 (4th Cir. 1979) (No. 77-2426, decided April 10, 1979). There the court decided that the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1321(f)(1) (FWPCA) affords the exclusive federal remedy for the recovery of oil pollution cleanup costs. The question before this court then is simply whether an action founded upon the FWPCA, §1321(f) is subject to the limitation of 28 U.S.C. §2415.

"This court concludes that it is. There is no suggestion in the legislative history of the FWPCA that Congress intended to place the government above duly-enacted statutes of limitations. Moreover, the government has not been able to cite any case which has so held. It is true that oil pollution is an offense against the United States, not actionable by any private citizen. But the fact that the government alone has standing to recover cleanup costs from polluters does not, without some affirmative legislative indication, give it limitless power to pursue its citizens whenever and wherever it chooses. The government also has the sovereign right to prosecute crimes, but there too it must observe appropriate statutes of limitation. 18 U.S.C. §§3281 *et seq.*

"Having decided that a statute of limitations must apply, the question is which one. The defendant argues that an action brought under the FWPCA is an action 'founded upon a tort' and therefore subject to the three-year limitation of 28 U.S.C. §2415(b). The court agrees. It is clearly not 'contract,' and although such an action could arguably be labeled one in quasi-contract,

on the theory that the polluter is unjustly enriched by the government's undertaking to clean up,[2] it seems more likely from the face of the statute that the wrong Congress sought to remedy is a tortious one.

"The statute, 33 U.S.C. §1321(f)(1), provides that

> (f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (c) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) or this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. . . .

---

[2]This court cannot accept this argument for the reason that by the very terms of the Act, the primary duty to take steps to abate pollution rests with the president, not with the polluter. 33 U.S.C. § 1331(c)(1). Thus it would be legally impossible for the polluter to be "unjustly enriched" by the government's performance of its own duty.

> It would not be a fair reading of the law to hold that where Congress spoke of 'negligence' and 'willful misconduct' it was not talking about tort. Accordingly, the statute of limitations which applies to tort actions brought by the United States, 28 U.S.C. §2415(b), bars the government from recovering its expenses incurred in cleaning up the defendants' spilled oil under 33 U.S.C. §1321(f), and summary judgment must be granted for the defendants."

There are three additional short paragraphs in the opinion which deal only with the issuance of a certificate under FRCP 54(b) and entry of an order for summary judgment. They have nothing to do with the merits of the case decided here.

II

A.

Specifically, I dissent from the majority's adoption of September 12, 1975 as the accrual date for the tort.

I disagree with the majority's consideration of this issue in the first place because it was not presented to the district court. E.g., *United States v. One 1971 Mercedes Benz*, 542 F.2d 912 (4th Cir. 1976). No exceptional circumstance is shown or claimed for not presenting the issue, except the government lost the case.

And not only was the issue not presented, it was precluded from consideration by the solemn writing of the government, signed and verified by an Assistant Attorney General of the United States as well as an Assistant United States Attorney. The majority ignores the government's answer on oath in the district court that the accrual date for its claim is August 10, 1975.

> Interrogatory No. 12 submitted by Shell to the government and its answer are as follows:
>
> 12. Identify the date on which you contend that this claim, or any part thereof, against Shell accrued and further state, with particularity, all facts and reasons on which you rely in support of your contention.
>
> Answer 12. August 10, 1975, by reason of the fact that oil from Shell's facility entered the Patapsco River on that date.

The government has not moved to be relieved of its answer even if such could be done. Thus, it is bound by the August 10th date. With August 10th as the accrual date, the government's action is time barred. The suit was filed September 6, 1978.

Also, the record does not support the majority's conclusion, variously stated, that the "September 12 completion date is undisputed." At 1111. See also at p. 1110, n. 1; p. 1111, n. 2; p. 1111, n. 3. Not only is it disputed, in the only chance Shell had to contest the September 12th date, it states in its brief, at p. 22, n. 12:

> The Government compounds its misconduct with an improper and obviously incorrect factual representation (wholly unsupported by the record) that "the cleanup was not completed until September 12, 1975."

The brief record made in this case does not so conclusively establish when the cleanup was completed that it is not open to question. No copy of a complete cleanup report is included in the record. "On-the-Scene-Coordinator-Notes" are included by the government with its responses to Shell's interrogatories, but these notes cease on August 18th. Those notes reveal that actual cleanup began on August 10, the day of the spill. By August 12, approximately 144,000 gallons of oil had been removed, with cleanup estimated at 75%

complete. J & L Ind. were released from future cleanup activities on August 16th. As stated, these notes provide a summary of activities only until August 18th. A letter report dated January 12, 1976 from the U. S. Coast Guard's Investigating Officer at Baltimore to the Commander of the Fifth Coast Guard District is also included with the government's answer to interrogatories. That letter states that "The last oil was removed from the water on 22 August 1975, and at that time the Coast Guard Strike Team departed. Final cleanup of small boats, beaches and booms was completed on 12 September 1975 and Clean Water, Inc. was released on that date." There is, however, not even documentation in the record to support the September 12th date beyond the bare letter which Shell is not bound to accept. The record reveals no details at all as to the cleanup between August 18 and September 12. Because Shell objects to the accuracy of the September 12 date, and the matter is the subject of a factual dispute, I disagree with the majority's adoption of that date. By so doing, this court is making a finding of fact as to a matter contested by the parties and not even considered by the district court.

An example within the majority opinion itself shows why this court should not engage in fact finding. Apparently to bolster the weight of evidence it relies on in its fact finding, the majority describes the letter of January 12, 1976 from the Coast Guard Investigating Officer to his superior as "an independent factual source." P. 1111, n. 2. Without further arguing the point, I can think of no less "independent" a source than a letter from one investigating officer to another, especially untested as it is by way of cross-examination or even discovery.

Until this appeal, Shell had never been given a chance to dispute the September 12th date, and its disputation of that

date in its brief here, which I have quoted, is not only unheeded and unmentioned by the majority, it is characterized in the opinion so that the reader is told that Shell does "not on apppeal contest the factual accuracy of the statement." P. 1111, n. 2. The majority can point to nothing in the record or briefs to support its statement that there is no contest of the September 12th date for the reason that there is nothing there except that which I have quoted. This bare statement is, I think, too slender a reed to support the opinion.

B.

Although I agree that the action here sounds in tort, I believe that the accrual date is August 10, 1975, the date of the spill. That is the date on which the harm occurred, thus making the cause of action complete. *Restatement (Second) of Torts,* § 899, Comment c. at 441 (1979). The government finds itself in no different position than any plaintiff who, with a claim for injury to his person, must file suit within a statutory time from the day his injury happened, although he may be required to pay large bills to physicians and hospitals for treatment occurring after the statute has run.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1603

United States of America,

Appellant,

versus

The Barge Shamrock, her tackle appurtenances, etc., and Harbor Towing Corporation, Shell Oil Company and Water Quality Insurance Syndicate,

Appellees.

ORDER

Upon consideration of the appellees' petitions for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petitions for rehearing are denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Winter. Judge Widener would have granted rehearing and rehearing en banc.

FILED
MAR-6 1981
U.S. Court of Appeals
Fourth Circuit

For the Court,

/s/ William K. Slate, II

CLERK

28 U.S.C. §2415

§2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further,* That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed after April 1, 1980 or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action

for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided,* That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before April 1, 1980.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided,* That in the event of

later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommended within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommended the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

33 U.S.C. §1321

§1321. Oil and hazardous substance liability

Definitions

(a) For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

"discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

(8) "remove" or "removal" refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established by the United States under article 24 of the Convention on the Territorial sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(4) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section;

(15) "inland oil barge" means a non-self-propelled vessel carrying oil in bulk as cargo and certificated to operate only in the inland waters of the United States, while operating in such waters;

(16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; determination of removability; liability; penalties

(b)(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the

Fishery Conservation and Management Act of 1976), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B)(i) The Administrator shall include in any designation under subparagraph (A) of this subsection a determination whether any such designated hazardous substance can actually be removed.

(ii) The owner or operator of any vessel, onshore facility, or offshore facility from which there is discharged during the two-year period beginning on October 18, 1972, any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided under subsection (f) of this section, as appropriate, to the United States for a civil penalty per discharge established by the Administrator based on toxicity, degradability, and dispersal characteristics of such substance, in an amount not to exceed $50,000, except that where the United States can show that such discharge was a result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States for a civil penalty in such amount as the Administrator shall establish, based upon the toxicity, degradability, and dispersal characteristics of such substance.

(iii) After the expiration of the two-year period referred to in clause (ii) of this subparagraph, the owner or operator of any vessel, onshore facility, or offshore facility, from which there is discharged any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided in subsection (f) of this section, to the United States for either one or the other of the following penalties, the determination

of which shall be in the discretion of the Administrator:

(aa) a penalty in such amount as the Administrator shall establish, based on the toxicity, degradability, and dispersal characteristics of the substance, but not less than $500 nor more than $5,000; or

(bb) a penalty determined by the number of units discharged multiplied by the amount established for such unit under clause (iv) of this subparagraph, but such penalty shall not be more than $5,000,000 in the case of a discharge from a vessel and $500,000 in the case of a discharge from an onshore or offshore facility.

(iv) The Administrator shall establish by regulation, for each hazardous substance designated under subparagraph (A) of this paragraph, and within 180 days of the date of such designation, a unit of measurement based upon the usual trade practice and, for the purpose of determining the penalty under clause (iii) (bb) of this subparagraph, shall establish for each such unit a fixed monetary amount which shall be not less than $100 nor more than $1,000 per unit. He shall establish such fixed amount based on the toxicity, degradability, and dispersal characteristics of the substance.

(v) In addition to establishing a penalty for the discharge of a hazardous substance determined not to be removable pursuant to clauses (ii) through (iv) of this subparagraph, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Conti-

nental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), where permitted under the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation, to be issued as soon as possible after October 18, 1972, determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of

this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(iii) of this subsection and who is otherwise subject to the jurisdiction of the United States, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) (ii) who is otherwise subject to the jurisdiction of the United States, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a

hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

Removal of discharged oil or hazardous substances: National Contingency Plan

(c)(1) Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976) the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities:

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous substance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

Maritime disaster discharges

(d) Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of

a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if neccessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection or under the Intervention on the High Seas Act (or the convention defined in section 2(3) thereof) shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil or hazardous substance.

Judicial relief

(e) In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

Liability for actual costs of removal

(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of

the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or

omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

Third party liability

(g) Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or

operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Rights against third parties who caused or contributed to discharge

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

Recovery of removal costs

(i)(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of, the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act, or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

Regulations; penalty

(j)(1) Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws

(A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. This paragraph shall not apply to any owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of subsection (b) of this section unless such owner, operator, or person in charge is otherwise subject to the jurisdiction of the United States. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

Authorization of appropriations

(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury such sums as may be necessary to maintain such fund at a level of $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (*l*) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

Administration

(*l*) The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

Boarding and inspection of vessels; arrest; execution of warrants or other process

(m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters

of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issue thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

Jurisdiction

(n) The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i)(l) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected

(o)(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned

property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as pre-empting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

Financial responsibility

(p)(1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only

be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after October 18, 1972, with respect to hazardous substances. The President shall delegate the responsibility to carry out the provbisions of this subsection to the appropriate agency head within sixty days after October 18, 1972. Regulations necessary to implement this subsection shall be issued within six months after October 18, 1972.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought asgainst him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issues thereunder, shall be subject to a fine of not more than $10,000.

(5) The Secretary of the Treasury may refuse the clearance required by section 91 of Title 46 to any vessel

subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(6) The Secretary of the Department in which the Coast guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

Establishment of maximum limit of liability with respect to onshore or offshore facilities

(q) The President is authorized to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under subsections (f)(2) and (3) of this section of less than $50,000,000, but not less than $8,000,000.

Liability limitations not to limit liability under other legislation

(r) Nothing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974.

List Naming All Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) and Affiliates of Shell Oil Company and Harbor Towing Corporation

Shell Oil Company

Butte Pipe Line Company, subsidiary of Shell Pipe Line Corporation

Dixie Pipeline Company, affiliate of Shell Pipe Line Corporation

Explorer Pipeline Company, affiliate of Shell Pipe Line Corporation

Gravcap, Inc., subsidiary of Shell Oil Company

Inland Corporation, subsidiary of Shell Oil Company

LOCAP, Inc., affiliate of Shell Pipe Line Corporation

LOOP, Inc., affiliate of Shell Oil Company

Olympic Pipe Line Company, affiliate of Shell Pipe Line Corporation

Seadock, Inc., affiliate of Shell Oil Company

Thumbs Long Beach Company, affiliate of Shell Oil Company

West Shore Pipe Line Company, affiliate of Shell Pipe Line Corporation

Wolverine Pipe Line Company, affiliate of Shell Pipe Line Corporation

East Texas Salt Water Disposal Company, affiliate of Shell Oil Company

MESDIC Financial Corporation of Houston, affiliate of Shell Oil Company

Oil Companies Institute for Marine Pollution Compensation Limited, affiliate of Shell Oil Company

WIDC (Wyoming Industrial Development Corporation), affiliate of Shell Oil Company
Plantation Pipe Line Corporation, affiliate of Shell Oil Company
Penn Central Corporation, affiliate of Shell Oil Company

Harbor Towing Corporation

Harbor Towing Corporation is a wholly owned subsidiary of International Bulk Transportation Company, which is a wholly owned subsidiary of SONAT Interocean Transportation Company, which is a wholly owned subsidary of Southern Natural Resources, Inc.

Southern Natural Resources, Inc., which is publically traded, has the following major subsidiaries:

1. Southern Natural Gas Company which holds:
   a. Southern Natural Gas Company
   b. Southern Energy Company
   c. Southern Deepwater Pipeline Company
   d. Southern Gas Storage Company
2. SONAT Exploration Company
3. The Offshore Company
4. Southern Forest Products, Inc.
5. Interstate and Ocean Transportation Company

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No. 80-2044

In the Supreme Court of the United States

OCTOBER TERM, 1980

SHELL OIL COMPANY AND HARBOR TOWING CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
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Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals, in reversing the district court's dismissal of the government's complaint, erred in holding that the government's suit to recover the costs of oil spilled by petitioners into the navigable waters of the United States was not time-barred.

1. This is an action by the government under the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. III) 1321, to recover the costs of cleaning up an oil spill. The government's complaint alleged that petitioners had spilled oil into the Patapsco River on August 10, 1975, and that the government had expended nearly $500,000 in cleaning up this oil from

the waters and surrounding beaches, boats, and booms. The government's clean-up operations were completed on September 12, 1975. This suit was filed on September 6, 1978.

The district court granted petitioners' motion for summary judgment and dismissed the complaint as time-barred. The court held that the three-year limitations period for actions founded upon a tort (28 U.S.C. (& Supp. III) 2415(b)) applies to suits by the government to recover clean-up costs under the Federal Water Pollution Control Act; that the government's cause of action arose on the date of the oil spill; and therefore that the three-year period had expired before the government had filed its suit.

The court of appeals reversed and remanded for further proceedings on the government's complaint (Pet. App. 1a-14a). Assuming arguendo that the three-year limitations period of 28 U.S.C. (& Supp. III) 2415(b) applied to this action, the court held that the government's cause of action under the Federal Water Pollution Control Act did not accrue until its clean-up operations had been completed (Pet. App. 5a) and hence that the instant suit was timely filed within three years of the "undisputed" completion date of September 12, 1975 (*id.* at 7a).

2. Because the decision of the court of appeals is interlocutory in nature, further review at this time is unwarranted. The decision below merely places petitioners in the same position they would have occupied if the district court had denied their motion for summary judgment in the first instance, and it is clear that such a denial would not have been subject to pretrial appeal. The same considerations that counsel against an interlocutory appeal of the denial of a summary-judgment motion militate against in-

terlocutory review of the present petition by this Court. Following a final judgment in the district court and completion of appellate review, petitioners will be able to raise the statute-of-limitations issue, together with any other issues concerning their liability under 33 U.S.C. (& Supp. III) 1321(f), in a single petition for a writ of certiorari.[1]

3. In any event, the decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

The court of appeals held that the complaint in this case was timely filed because "[t]he cause of action [under the Federal Water Pollution Control Act] for recouping expenses incurred by the government does not fully accrue until the government has completely exercised its option [whether to remove the spilled oil] and completed the cleanup operation" (Pet. App. 5a).[2] This holding is entirely consistent with the text and operation of the Act.

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[1] This Court will "not issue a writ of *certiorari* to review a decree of the * * * [c]ourt of [a]ppeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893). See also, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916). To grant review in the circumstances of this case would entail "the inconvenience and costs of piecemeal review * * *." *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 511 (1950).

[2] Contrary to petitioners' suggestion (Pet. 5, 7), the court of appeals did not hold that the three-year limitations period for tort suits is applicable to actions to recover clean-up costs under the Federal Water Pollution Control Act. Rather, the court held only that this case was not time-barred even

Under the Federal Water Pollution Control Act, "[t]he primary duty for cleaning [up] the oil spill, was of course, upon the [c]ompanies" (Pet. App. 4a; citations omitted).[3] In addition, however, the Act also provides that "[w]henever any oil * * * is discharged * * * into or upon the navigable waters of the United States * * *, the President is *authorized* to act to remove or arrange for the removal of such oil * * * at any time, unless he determines such removal will be done properly by the * * * [responsible private parties]." 33 U.S.C. (& Supp. III) 1321(c)(1) (emphasis added). Thus, the Act gives "the Executive Branch an option" (Pet. App. 4a) by authorizing the President, in his discretion, to undertake to remove the oil "[i]n order to avoid the obvi-

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assuming the applicability of the statute of limitations urged by petitioners. Therefore, the court did not consider the government's additional arguments that no statute of limitations applies to this statutory action to recover clean-up costs and that, if a limitations period is applicable, the action is quasi-contractual in nature and thus subject to a six-year limit (Pet. App. 4a).

[3] Petitioners claim (Pet. 7-8 & n.6) that polluters are under no obligation to clean up their oil spills and indeed are not even permitted to do so in the absence of permission by the President. In petitioners' view, the Act imposes upon the President the affirmative duty to clean up such spills. This novel contention is inconsistent with the plain language of the statute, which "authorize[s]" but nowhere requires the President to act. Moreover, the Conference Report, in the sentence immediately following that quoted by petitioners (Pet. 8 n.6), makes clear that the statute "is not to be construed to inhibit or prevent any owner or operator from undertaking whatever action is necessary to contain or remove an oil discharge." H.R. Conf. Rep. No. 91-940, 91st Cong., 2d Sess. 38 (1970).

ous consequences of possible delay or ineffectiveness" by the private parties (*id.* at 4a). In exercising this option, "[t]he President may act or decline to act. * * * [Moreover,] once a government cleanup is started it can be delayed at the direction of the President. * * * [And g]overnment action in appropriate circumstances might be terminated prior to completion" (*id.* at 5a).

As a concomitant to this authority, the Act entitles the United States to recover actual costs of removal up to (a) full costs in cases of willful negligence or willful misconduct, or (b) costs within statutory limits in all other cases. 33 U.S.C. (& Supp. III) 1321(f). Since this cause of action to recover clean-up costs is grounded on the government's effort to remove the oil spill, and since that effort is still in progress and subject to modification prior to completion of the clean-up, the "injury" addressed by the statute does not occur until the removal of the oil has been finished. Accordingly, the court of appeals correctly held, consistent with the general law on statutes of limitations cited by petitioners, that the government's cause of action did not accrue until the removal of the oil had been completed and the statutory injury to the United States had become final.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

AUGUST 1981

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